(9)

No. 00-5250

In The

Supreme Court of the United States

WESLEY A. SHAFER,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Writ Of *Certiorari* To The Supreme Court Of South Carolina

BRIEF *AMICUS CURIAE* OF THE CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS*..... 1

ARGUMENT 2

I. IN EVERY CAPITAL CASE IN WHICH LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IS A SENTENCING OPTION, THE JURY SHOULD BE INFORMED OF THE DEFENDANT'S INELIGIBILITY FOR PAROLE 2

A. Jurors Substantially Underestimate the Minimum Period of Incarceration for Capital Defendants Who Are Not Sentenced to Death 3

B. For Capital Jurors, Future Dangerousness Is Always "At Issue." 6

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Caldwell v. Mississippi, 472 U.S. 320 (1985) 12

Gardner v. Florida, 430 U.S. 349 (1977) 3, 12

Ramdass v. Angelone, 120 S. Ct. 2113 (2000) 2, 7, 11

Simmons v. South Carolina, 512 U.S. 154 (1994) 2, 3, 4, 7, 11, 12

Williams v. Taylor, 120 S. Ct. 1495 (2000) 10

OTHER AUTHORITIES:

William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) 5

William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999) 4, 5, 6, 8

Theodore Eisenberg et al., *But Was He Sorry: The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) 1

Theodore Eisenberg et al., *Jury Responsibility in Capital Cases: An Empirical Study*, 44 BUFF. L. REV. 339 (1996) 1

Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, ___ S. CAL. L. REV. (forthcoming Jan. 2001) 1

Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) 1, 6

TABLE OF AUTHORITIES – Continued

Page

Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) 1

Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) 1

J. Mark Lame, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327 (1993) 11

INTEREST OF *AMICUS*[1]

The Cornell Death Penalty Project (the Project) is an undertaking of the Cornell Law School. Part of the Project's mission is to conduct empirical analyses of juror decision making in capital cases as a participant in the multi-state Capital Jury Project (the CJP).[2] The Project is responsible for the CJP's efforts in South Carolina and has so far conducted interviews with 187 jurors who served on 53 South Carolina capital cases tried between 1988 and 1997. Empirical analyses based on those interviews have been published in a number of articles.[3] Twenty-one additional interviews conducted in the summer of 2000 are in the process of being added to the existing database. The Project seeks to intervene as *amicus curiae* in cases presenting questions on which the Project's

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

[2] For a description of the CJP and its methodology, see *infra* note 4.

[3] *See* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, __ S. CAL. L. REV. (forthcoming Jan. 2001); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).

empirical findings could prove helpful to the tribunal's decision making.

ARGUMENT

I.

IN EVERY CAPITAL CASE IN WHICH LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IS A SENTENCING OPTION, THE JURY SHOULD BE INFORMED OF THE DEFENDANT'S INELIGIBILITY FOR PAROLE.

"The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994) (plurality opinion). According to *Simmons*, two conditions must concur to create this "false dilemma." First, future dangerousness must be "at issue," thereby creating the dilemma. Second, the defendant must be parole ineligible, a fact which makes the dilemma between imposing a life sentence and preventing danger to society in the future a *false* one. *See id.*; *see also Ramdass v. Angelone*, 120 S. Ct. 2113, 2119 (2000) (Due process requires that where future dangerousness is "at issue" the defendant is entitled "to inform the jury of parole ineligibility, either by a jury instruction or in arguments by counsel.").

The *Simmons* rule is a rule of disclosure. It is based on the broader due process principle prohibiting the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Here we briefly review the empirical findings that provide compelling support for the general rule announced in *Simmons*. We then turn to the open question of when future dangerousness should be deemed "at issue." On this question the available data reveals that jurors are very likely to discuss future dangerousness and to rely upon it when deciding what sentence to impose *regardless of whether the prosecutor presents evidence relating to future dangerousness or argues future dangerousness in summation*. The published CJP research, as well as our own analysis of interviews with South Carolina jurors, shows that future dangerousness is "at issue" in every capital case. Thus in all capital cases in which life imprisonment without parole is an alternative sentence to the death penalty, the jury should be fully informed about the defendant's parole ineligibility.

A. Jurors Substantially Underestimate the Minimum Period of Incarceration for Capital Defendants Who Are Not Sentenced to Death.

This Court first confronted the question of whether due process requires a sentencing jury to be informed of a capital defendant's parole ineligibility in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The plurality and concurring opinions in *Simmons* both noted that life-term defendants had historically been eligible for parole. Only recently had parole been placed off-limits to such defendants – a development of which many jurors would be unaware. *See id.* at 170 (plurality opinion); *id.* at 177-78 (O'Connor, J., concurring in the judgement). The concern at the core

of *Simmons* was that without full and complete information regarding a defendant's ineligibility for parole, jurors would be confronted with what was in reality a false choice: Because jurors substantially underestimate the time a capital defendant will spend in prison if not sentenced to death, they mistakenly fear that declining to impose a death sentence will expose the public to future danger. *See id.* at 163-64 (plurality opinion) ("Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.").

The empirical evidence accumulated since *Simmons* serves only to reinforce the wisdom of the rule it announced. The CJP data is unequivocal.[4] Researchers

[4] The CJP is a National Science Foundation-funded, multi-state research effort designed to better understand the dynamics of juror decision making in capital cases. In 1990 the CJP began interviewing jurors who had served on capital cases. CJP researchers have to date conducted interviews with 916 jurors who sat on 257 capital trials in 11 different states (Alabama, California, Florida, Georgia, Kentucky, Missouri, North Carolina, Pennsylvania, South Carolina, Texas, and Virginia). *See* William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 608 n.6 (1999). The CJP's aim was to conduct interviews with at least four jurors from a sample of cases in which half of the cases resulted in a final verdict of death and half in a final verdict of life imprisonment. The total number of interviews to date in each state ranges from 45 jurors in Virginia to 187 in South Carolina.

Each juror responded to a set of questions contained in a 51-page survey. Interviewers were trained to administer the survey. Each interview generally lasted between three and four hours. The survey asked questions about the guilt phase of the trial as well as the penalty phase; about the evidence presented; about the demeanor of the defendant, the actions of the victim's family, and the performance of the lawyers and the judge; about the legal instructions given; about the process of the jury's deliberations; and about the verdict reached. Demographic information – e.g., race, sex, age, religion – was also collected, as was information about each juror's attitudes toward the death penalty and the criminal justice system more generally. All told each interview yielded data on over 750 variables. *See generally* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

have consistently found that "jurors grossly underestimate how long capital murderers not sentenced to death usually stay in prison." William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 648 (1999) (analyzing multi-state data). In South Carolina, where Petitioner was tried, the median juror estimate of years usually served by capital murderers not sentenced to death is only seventeen years. *See id.* at 647 tbl.1. Thus the typical South Carolina juror, told only that the alternative to a death sentence was a sentence of "life imprisonment," would have thought that nineteen-year-old Wesley Shafer would be released at the still-threatening age of thirty-six. Less than one percent of South Carolina jurors would have (correctly) believed that he would never be released. *See id.* at 649 tbl.2.

These misconceptions about parole eligibility have predictable and deadly consequences. The shorter the period of time that a juror thinks the defendant will be imprisoned, the more likely he or she is to vote for death on the final ballot. *See id.* at 655 (analyzing multi-state

data);[5] Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 5-6 (1993) (analyzing South Carolina data).[6] Indeed, issues related to the defendant's dangerousness should he ever return to society (including the possibility and timing of such a return) are second only to the crime itself in the attention they receive during the jury's penalty-phase deliberations. *See id.* at 6. Future dangerousness to society overshadows evidence presented in mitigation (such as the defendant's intelligence, remorse, alcoholism, mental illness), and even any concern about the defendant's dangerousness in prison. *See id.*

B. For Capital Jurors, Future Dangerousness Is Always "At Issue."

When future dangerousness is "at issue" the defendant is entitled "to inform the jury of parole ineligibility, either by a jury instruction or in arguments by counsel."

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[5] About two-thirds of the jurors who believed the defendant would be released in less than 20 years cast their final vote for death, whereas less than half of the jurors (43 percent) who believed the defendant would serve at least 20 years cast their final vote for death. *See* Bowers & Steiner, *supra*, at 655 tbl. 3. Moreover, misconceptions regarding parole eligibility and release exercise the greatest influence on jurors who have not made up their minds at the beginning of the jury's deliberations. *See id.* at 660.

[6] The odds that this correlation – i.e., the correlation between a juror's estimate of the defendant's length of imprisonment and the juror's vote – is the product of chance are only one in a thousand. *See* Eisenberg & Wells, *supra*, at 7.

Ramdass, 120 S. Ct. at 2119. But when should future dangerousness be deemed "at issue?"

Simmons itself presented a case in which the "State raised the specter of . . . future dangerousness generally." *Simmons*, 512 U.S. at 165 (plurality opinion). Petitioner here argued in the court below that, taken together, the state's evidence and arguments likewise raised the specter of future dangerousness. Petitioner therefore reads *Simmons* to require a particularized showing on the part of the defendant that the state put the defendant's future dangerousness "at issue." Our analysis of the available data lead us to urge a simpler rule: Future dangerousness is on the minds of jurors and therefore "at issue" in virtually all capital cases; consequently, the defendant should be required to make no particularized showing of that fact.

CJP interviews conducted among jurors in several states provide strong evidence that, no matter what the prosecution says or does, future dangerousness is always on the minds of capital jurors. The CJP asked jurors two questions that can be used to assess the extent to which the prosecution focused on the defendant's future dangerousness: (1) "How much did the prosecutor's evidence and arguments at the punishment stage of the trial emphasize . . . that the death penalty will keep [the defendant] from killing again?" and (2) "How much did the prosecutor's evidence and argument at the punishment stage of the trial emphasize . . . danger to the public if [the defendant] ever escaped or was released from prison?" The responses reveal that even in cases in which the prosecution's evidence and argument at the penalty phase did "not at all" emphasize the defendant's future

dangerousness, jurors who believed the defendant would be released in under 20 years if not sentenced to death were much more likely to cast their final vote for a death sentence than were jurors who thought the alternative to a death sentence was 20 years or more.[7] *See* Bowers & Steiner, *supra*, at 665 tbl.6.

In an effort to further explore the role future dangerousness plays in capital jury decision making – even when the prosecution's evidence and argument at the penalty phase do not focus on the defendant's future dangerousness – we conducted for purposes of this submission two additional and relatively simple analyses based exclusively on our interviews with South Carolina jurors.

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[7] Among jurors who believed the prosecutor did not emphasize at all that the death penalty would prevent the defendant from killing again and who estimated that the alternative to a death sentence was zero to nine years in prison, 73.1 percent cast their final vote for death; similarly, among those who estimated the alternative was ten to nineteen years, 69.4 percent cast their final vote for death. In contrast, among those who estimated the alternative was twenty years or more, only 43.8 percent cast their final vote for death. *See* Bowers & Steiner, *supra*, at 665 tbl.6.

Among jurors who believed the prosecutor did not emphasize at all the danger of escape or release and who estimated that the alternative to a death sentence was zero to nine years in prison, 58.1 percent cast their final vote for death; similarly, among those who estimated the alternative was ten to nineteen years, 63.3 percent cast their final vote for death. In contrast, among those who estimated the alternative was twenty years or more, only 39.0 percent cast their final vote for death. *See id.*

We first explored the extent to which jurors – without any prompting from the prosecution – discussed future dangerousness during their deliberations. We isolated the responses of those jurors who said that the prosecutor's evidence and argument at the punishment phase of the trial emphasized "not at all" the danger to the public if the defendant ever escaped or was ever released. Despite the *prosecutor*'s total silence on the subject of future dangerousness, 23 percent of the jurors nonetheless said that the *jury*'s discussions focused "a great deal" on the defendant's dangerousness if he ever got back into society, and an additional 30 percent said the jury focused on that issue "a fair amount." *See* App. A tbl.1.[8] Likewise, 21 percent said that the jury's discussion focused on how likely the defendant would be to get a parole or pardon "a great deal," and another 40 percent said the jury discussed it "a fair amount." *See id.* Thus even in cases where prosecutors have not affirmatively "raised the specter of future dangerousness," that specter is present all the same, with over *half* of the jurors reporting (based on these measures) that the jury's discussions focused either a great deal or a fair amount on future dangerousness.[9]

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[8] The information described in the above paragraph and reproduced in Appendix A was previously collected under the auspices of the CJP and the Cornell Death Penalty Project. The reported percentages are based on a simple operation known as "cross-tabulation." The underlying data needed to replicate the results are available to anyone (including of course the members of this Court) upon request.

[9] The other measures reported in Table 1 tell a similar story. Twenty-two percent of the jurors said the jury discussed a "great deal" *how long* it would be before the defendant was

Second, the extent to which the jury focuses on and discusses future dangerousness is not *just* talk. Even among those jurors who reported that the prosecutor's evidence and argument emphasized "not at all" the danger to the public if the defendant ever escaped or was released, most said the defendant's future dangerousness was important to his or her own sentencing decision. "When considering punishment," 31 percent of the jurors were "greatly concerned" "that the defendant might get back into society someday, if not given the death penalty," and another 21 percent were "somewhat concerned."[10] *See* App. A tbl.2. Thus on an *average* jury in a case in which the prosecutor made *no* reference to the defendant's future dangerousness, *eight or nine* jurors would be either greatly concerned or somewhat concerned that the defendant might return to society if not given the death penalty.

In short, future dangerousness is "at issue" in the minds of a substantial number of jurors *regardless of the nature of the prosecutor's evidence and argument*. *Cf. Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000) (granting relief where petitioner argued that a reasonable probability

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released, and an additional 35 percent said the jury discussed it "a fair amount." Likewise, 32 percent said the jury discussed "a great deal" the need to prevent the defendant from killing again, and an additional 34 percent said the jury discussed it "a fair amount." *See* App.A tbl.1.

[10] Similarly, when asked "How important was 'keeping the defendant from ever killing again' for you in deciding what the defendant's punishment should be?" 43 percent of these unprompted jurors said it was "very important," and another 26 percent said it was "fairly important." *See* App. A tbl.2.

existed that evidence not presented at trial would have influenced the vote of "at least one juror"). Whether or not the prosecution talks about future dangerousness, the jurors surely will. Indeed, the omnipresent specter of future dangerousness explains why jurors – including the jurors in Petitioner's case – commonly ask questions about a defendant's parole eligibility. *See, e.g.*, J. Mark Lane, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 Loy. L.A. L. Rev. 327, 335-36 (1993) (reporting that sentencing juries asked questions about parole eligibility in one quarter of the cases in which a death sentence was returned). Jurors are desperate to know the truth.

The best rule here is honesty. If a capital defendant not sentenced to death will never see the light of day, the jury should be told that simple truth. Such a rule not only has honesty on its side; it would also better advance the goals *Simmons* itself was originally intended to serve. It would ensure that the false dilemma never arises. It would also have the advantage of being clear and "workable." *Cf. Ramdass*, 120 S. Ct. at 2120 (emphasizing that application of *Simmons* only to cases where the defendant is ineligible for parole under state law is a "workable rule"). Prosecutors would have no incentive under such a rule to see how far they could hint at future dangerousness without actually crossing some invisible line. Nor would trial judges or reviewing courts have to deal one case at a time with the often elusive question of whether the state, either through evidence or the argument, affirmatively "raised the specter of . . . future dangerousness generally." *Simmons*, 512 U.S. at 165 (plurality opinion).

Most importantly juries would no longer sentence defendants to death "on the basis of information which [the defendant] had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362.

CONCLUSION

Like the jury in *Simmons*, the jury in Petitioner's case "was left to speculate about [his] parole eligibility when evaluating his future dangerousness and was denied a straight answer even about petitioner's parole eligibility even when it was requested." *Simmons*, 512 U.S. at 165-66 (plurality opinion). Like the defendant in *Simmons*, and like all capital defendants in states where an alternative to the death penalty is life imprisonment without the possibility of parole, Petitioner "was prevented from rebutting information which the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death." *Id.* at 165 (plurality opinion). This barrier created "an unacceptable risk that the death penalty [may have been] imposed . . . through whim *or mistake*." *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring in part and concurring in the judgement) (emphasis added) (citation omitted).

The reality of capital jury decision making is this: Questions about the defendant's future dangerousness – questions to which clear information about the defendant's ineligibility for parole can mean the difference between life and death – will always be "at issue" in the minds of the jurors in whose hands the defendant's fate finally rests. Consequently, whenever the alternatives to

the death penalty include a sentence of life imprisonment without the possibility of parole, the trial court should provide the jury with the information necessary to dispel the jury's inevitable but erroneous concerns about future dangerousness.

Respectfully submitted,

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APPENDIX A

Table 1

Responses of Jurors Who Said the Prosecutor's Evidence and Argument at the Punishment Stage of the Trial Emphasized "Not at All" the Danger to the Public if the Defendant Ever Escaped or Was Released From Prison (% Responding)

How much did the discussion among the jurors focus on the following topics?

	A Great Deal	Fair Amount	Not Much	Not At All	*n*
Defendant's dangerousness if ever back in society	23	30	21	26	53
How likely he would be to get a parole or pardon	21	40	19	21	53
How long before he got a parole or pardon	22	35	20	24	51
Need to prevent him from killing again	32	34	15	19	53

Table 2

Responses of Jurors Who Said the Prosecutor's Evidence and Argument at the Punishment Stage of the Trial Emphasized "Not at All" the Danger to the Public if the Defendant Ever Escaped or Was Released From Prison (% Responding)

How important was the following consideration for you in deciding what the defendant's punishment should be?

	Very	Fairly	Not Much	Not at All	*n*
Keeping the defendant from ever killing again	43	26	11	19	53

When you were considering the punishment, were you concerned that the defendant might get back into society someday, if not given the death penalty?

	Yes, Greatly Concerned	Yes, Somewhat Concerned	Yes, But Only Slightly Concerned	No, Not At All Concerned	*n*
	31	29	10	31	52